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NO. 82-184

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

L.B.B. CORPORATION,
Petitioner

v.

CHARLES O. FINLEY & CO., INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT, CHARLES O. FINLEY & CO., INC., IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether or not the decision of the U.S. District Court granting the motion of the respondent for judgment notwithstanding the verdict was correct.

2. Whether or not the opinion of the three-judge panel of the court of appeals affirming the trial court for non-substantive reasons was correct.

3. Whether or not the denial of the petition for rehearing was correct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1982. A petition for rehearing on said decision was denied March 25, 1982. The petition for a writ of certiorari

was filed on July 29, 1982. The jurisdiction of this court is invoked by the petitioner under 28 U.S.C. 2101 and 28 U.S.C. 1254.

STATEMENT

The petitioner, L.B.B. Corporation, filed suit against the respondent, Charles O. Finley & Co., Inc., in the United States District Court for the District of Rhode Island on April 26, 1974. The basis of said suit was a written contract entered into between the petitioner and respondent on May 30, 1973 in Chicago, Illinois. The basis of jurisdiction for the suit was diversity.

After service of process on the respondent on April 30, 1974, the respondent filed a motion to dismiss for lack of in personam jurisdiction. Said motion was granted by the chief judge of the U.S. District Court of Rhode Island on October 31, 1974. On November 8, 1974, the petitioner's motion to

transfer this cause to the United States District for the Northern District of Illinois was granted.

Following, among other matters, the denial of the petitioner's motion for summary judgment in 1976, this cause was transferred to Senior Judge J. Sam Perry on July 1, 1980. It was called for trial on December 1, 1980. The trial commenced on that date, continuing until December 5, 1980. The jury then deliberated for approximately eight hours, on December 5, 1980, and Monday, December 8, 1980. After a special instruction was then given to the jury and after further deliberation, they were dismissed as being hopelessly deadlocked.

On December 16, 1980, counsel for the respondent filed with the trial court its written motion for judgment notwithstanding the verdict. Said motion having been served on petitioner's trial counsel in Rhode Island, it was then presented in open court to local counsel for the petitioner. While filing this

motion, counsel for the respondent informed the trial court that the motion as drafted would stand as respondent's memorandum of law in support of its request for judgment notwithstanding the verdict.

On December 18, 1980, counsel for the petitioner filed a motion for judgment notwithstanding the verdict in its behalf. Said motion came before the trial court on December 23, 1980 at which time counsel for the respondent filed a motion in opposition to petitioner's motion for judgment notwithstanding the verdict, praying that said motion be stricken. A memorandum in support of respondent's motion to strike was filed on January 16, 1981.

On February 10, 1981, the trial judge, after taking the matter under advisement on the motions and memoranda filed by opposing counsel, issued a memorandum order granting the respondent's written motion for judgment notwithstanding the verdict and its motion to strike the

petitioner's motion for judgment notwithstanding the verdict (see Pet. App. A). An appeal was claimed in the court of appeals by the petitioner on or about February 27, 1981.

Briefs were filed on the issues raised in the petitioner's brief and oral argument was set for early December, 1981. Upon motion of the petitioner, oral arguments in this matter were waived. The court of appeals took the matter under advisement on the briefs which had been filed. On January 28, 1982, the court of appeals filed an order dismissing all of petitioner's contentions and thereby affirming the judgment granted by the trial court on behalf of the respondent (Pet. App. B). A petition for rehearing was filed on March 8, 1982 (Pet. App. D) and was denied by the court of appeals on March 25, 1982 (Pet. App. C).

ARGUMENT

1. Petitioner contends (Pet. 13-16) that the district court erred in granting judgment

notwithstanding the verdict without setting forth express findings of fact and conclusions of law in support of said judgment. For reasons well stated in the court of appeals decision upon which we rely, that contention is without merit.

Petitioner suggests that a failure to specify such findings in writing would lead to a conflict between different circuits of the courts of appeal. This allegation is totally without merit. In support of its claim, petitioner refers to two cases decided in the Sixth Circuit: Garrison v. Jervis B. Webb Co., 583 F.2d 258 (6th Cir. 1978) and Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978). In Garrison, the Sixth Circuit Court of Appeals, in dicta located in a footnote, commented that it is the better practice to make formal findings of fact and conclusions of law when granting a judgment notwithstanding the verdict. However, the court went on to state that there is by no means a requirement under Federal Rule

of Civil Procedure 50 to make such express findings. Garrison, 583 F.2d at 261. Thus, while recommending the practice of express findings in a situation where a judgment notwithstanding the verdict is contemplated, the Garrison court did not hold contrary to petitioner's claims that it was an absolute necessity. This conclusion is obvious from the subsequent Morelock decision, where the same court of appeals, just two months later, held that it would not reverse a decision and remand it for new trial solely because the trial court had failed to make express findings of fact and conclusions of law when granting a judgment notwithstanding the verdict, pursuant to Federal Rule of Civil Procedure 50. Morelock, 586 F.2d at 1098.

Examination of these decisions and the decision by the court of appeals in this case (Pet. App. B) reveal that the court of appeals for the Sixth Circuit and the Seventh Circuit are not in conflict but rather in accord. In

ruling on the necessity of express, written findings, the court of appeals herein held that:

> Although this court would prefer that the district court make findings of fact and conclusions of law in directed verdict and in judgment notwithstanding the verdict, it is not mandated by Federal Procedural Rules. Weir v. Chicago Plastering Institute, 272 F.2d 883, 888 (7th Cir. 1959) (Pet. App. B)

After stating this desire, which is obviously in accord with the desires of the Sixth Circuit, the court of appeals nonetheless proceeded to uphold the judgment notwithstanding the verdict in this case, despite omission of the trial court in making express findings of fact and conclusions of law.

Despite this absence of conflict among the circuits requiring examination by this Court, the petitioner goes on to cite a number of cases which would supposedly mandate express findings in a Federal Rule of Civil Procedure 50 situation, e.g. a judgment notwithstanding

the verdict (Pet. 14). Examination of the cases listed in this section of the brief, however, reveal that not only do none of them deal with Federal Rule of Civil Procedure 50, but in addition, none remotely suggest that express findings of fact and conclusions of law are required when one grants a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50.

Finally, petitioner's suggestion that a recent decision of the Court of Appeals for the Seventh Circuit is at variance with the decision in this case is incorrect. Petitioner's statement of the holding in that case, Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), is totally misleading. Rejecting the strict rule on the procedures to be followed to preserve a motion for directed verdict throughout the various stages of a trial, the court of appeals therein held that a judge does not have to reserve a ruling on a directed

verdict in order to grant a judgment notwithstanding the verdit at a later time. Bonner, 657 F.2d at 939.

Finally, petitioner's argument that its Seventh Amendment rights were violated by the granting of judgment notwithstanding the verdict is without merit. Petitioner's reliance on a case decided before Federal Rule of Civil Procedure 50 was promulgated, to substantiate this point only underscores the specious nature of this argument.

2. Petitioner also complains (Pet. 10-11, 16-18) that court of appeals erred when it affirmed the trial court for "nonsubstantive" reasons. Apparently, petitioner, by use of the term "nonsubstantive," is referring to the court of appeals' dismissal of the petitioner's attempt to overturn the judgment notwithstanding the verdict for failure of the petitioner to file relevant transcripts. Federal Rule of

Appellate Procedure 10(b)(2). Accordingly, petitioner is requesting that this Court exercise its supervisory power to remedy this situation. For reasons well stated in the record of this cause and in the opinion of the court of appeals, again upon which we rely, this contention and request is without merit.

Specifically, petitioner requests that this Court invoke its supervisory power to overturn the court of appeals decision because, supposedly, the court therein required the petitioner, even though the petitioner did not raise the question of the sufficiency of the evidence, to file transcripts of all evidence adduced at trial before it considered the adverse decision of the trial court. (Pet. 16) For the following reasons, no invocation of the supervisory powers of this Court is necessary.

First, the court of appeals never requested that the petitioner file "transcripts of all evidence adduced at trial." (Pet. 16) Rather,

consistent with the requirements of Federal Rule of Appellate Procedure 10(b)(2), the court of appeals merely requested that if the petitioner felt that in some manner the judgment notwithstanding the verdict was improvidently granted or unsupported by or contrary to the evidence, it

> "shall include in the record a transcript of all evidence relevant to such a finding or conclusion." (Pet. App. B, emphasis added)

Without this, the court of appeals correctly concluded that it could not make an informed decision and thereby declined to make one, thus affirming judgment in respondent's behalf.

Sidestepping this discrepancy neatly, petitioner further suggests that the court, without benefit of a transcript, should still have overturned the judgment notwithstanding the verdict because it was

> "so clearly deficient on its face as to justify a reversal and new trial." (Pet. 17)

One wonders, as must have the court of appeals, what is so clearly deficient on the face of the memorandum order granting judgment notwithstanding the verdict to the respondent that required reversal, without citation to a specific error. And despite petitioner's protestation that although they never filed a transcript, they never suggested the conclusion of the trial judge was unsupported by or contrary to the evidence (Pet. 17), the record indicates otherwise. In the brief which the petitioner filed in the Seventh Circuit Court of Appeals, petitioner states, without citation to any transcript, the following:

> "In the instant matter, in addition to the failure of the court below to even mention the rule to be observed, followed and/or applied, the court clearly did not assess all of the evidence in a light most favorable to the party moved against in order to determine whether it so overwhelmingly favored the movant that no contrary verdict based on the evidence could ever stand. Pittsburgh-DesMoines Steel v. Brookhaven Manor Water Co., supra. This is manifest from the decision

> attached hereto as Appendix 6." (Appendix 6 is petitioner's Appendix A, the memorandum order of the trial court.)(Petitioner's brief in the Seventh Circuit Court of Appeals, pp. 21-22.)

In light of this statement, it is obvious why the court of appeals dismissed this particular argument for failure to file a transcript. In so doing, it was merely applying Federal Rule of Appellate Procedure 10(b)(2), the interpretation which and the enforcement of have allowed the sanction of dismissal over the years. United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975); Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974); United States v. Gallagher, 151 F.2d 556 (10th Cir. 1945); McBee v. United States, 126 F.2d 238 (9th Cir. 1942), cert. denied 317 U.S. 691. Accordingly, there is nothing in the entire record which indicates that the court of appeals in this particular case as so far departed from the accepted and usual course of judicial

proceeding or so far sanctioned such a departure by a lower court, which would call for an exercise of this Court's power of supervision. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

3. Petitioner finally contends that the denial of its petition for rehearing was error by the court of appeals. Presumably, although not expressly stated, the petitioner is again invoking this Court's supervisory power to remedy this alleged error. A review of the record in this cause reveals no basis for this Court to exercise its supervisory power to overturn the court of appeals' denial of a petition for rehearing.

The particular rule involved here requires that a petition for rehearing shall state with particularity the points of law or fact which in the opinion of the petitioner the reviewing court has overlooked or misapprehended, and in addition shall contain such argument in support

of the petition as desired. Federal Rule of Appellate Procedure 40(a). Part of the petition for rehearing filed by the petitioner dealt with such issues. Basically, the petitioner raised the same argument which have been previously discussed in sections 1 and 2 herein, supra. In denying the petition for rehearing on these specific grounds, the court of appeals was obviously indicating that nothing had been presented to them to change its earlier decision.

However, the bulk of the petition for rehearing dealt with petitioner's belated attempt to file a transcript regarding the issues raised in the brief regarding the judgment notwithstanding the verdict (Pet. App. D). Examination of the Federal Rules of Appellate Procedure (FRAP. 40(a) reveal that this is not a proper issue for a petition for rehearing, in that it was not an issue raised by the original briefs. Marion Steam Shovel Co. v. Bertini,

82 F.2d 945 (8th Cir. 1938). On a more practical level, however, it is obvious that this is an ex post facto attempt by the petitioner to mislead the court of appeals. Petitioner's own exhibits indicate that as early as December 15, 1981, petitioner's lawyer had been notified by the Clerk of the Court of Appeals for the Seventh Circuit that the Court of Appeals needed transcripts relevant to petitioner's arguments regarding the judgment notwithstanding the verdict in order to make an informed decision on petitioner's claims. (Pet. App. D, Exhibits 1, 2, 3) No action having been taken by the petitioner to satisfy the court of appeals' request, the court then rendered its decision approximately one and one-half months later. Since no transcripts were filed during that month and a half period, petitioners' later request to file transcripts, as raised in the petition for rehearing, appropriately fell upon deaf ears. No basis exists for this court to exercise its

supervisory power to overturn the denial of the petition for rehearing, in that the court, in making this decision, obviously has not departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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